

Filed
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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

)	Case No.: 5:15-xr-90304-HRL-1 (LHK)
)	
IN RE APPLICATION TELEPHONE)	MOTION FOR LEAVE TO FILE
INFORMATION NEEDED FOR A CRIMINAL)	<i>AMICUS CURIAE</i> BRIEF OF
INVESTIGATION)	ELECTRONIC FRONTIER
)	FOUNDATION IN SUPPORT OF A
)	WARRANT REQUIREMENT FOR
)	HISTORICAL CELL SITE
)	INFORMATION
)	
)	
)	

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF
ELECTRONIC FRONTIER FOUNDATION
CASE NO.: 5:15-xr-90304-HRL-1(LHK)

1 The Electronic Frontier Foundation (“EFF”) requests this Court permit it leave to file a brief
 2 *amicus curiae* in support of a warrant requirement for historical cell site information. Counsel for
 3 the government and the Federal Public Defender do not object to EFF filing an *amicus* brief of no
 4 more than 20 pages. EFF plans to file its amicus brief on June 12, 2015, the same day the Federal
 5 Public Defender’s brief is due.

6 EFF is a member-supported civil liberties organization based in San Francisco, California,
 7 working to protect innovation, free speech, and privacy in a digital world. With approximately
 8 20,000 dues-paying members nationwide, EFF represents the interests of technology users in both
 9 court cases and in broader policy debates surrounding the application of law in the digital age. As
 10 part of its mission, EFF has served as *amicus curiae* in landmark cases addressing Fourth
 11 Amendment issues raised by emerging technologies. *See, e.g., Riley v. California*, 134 S. Ct. 2473
 12 (2014); *United States v. Jones*, 132 S. Ct. 945 (2012); *City of Ontario v. Quon*, 560 U.S. 746 (2010).

13 EFF has particular expertise and interest in location-based tracking technologies such as
 14 GPS and the collection of cell site tracking data, and has served as an *amicus* in numerous federal
 15 and state cases involving historical cell site information, including a case arising from a similar
 16 procedural posture last summer before the Honorable Nathanael Cousins. *See In re Telephone*
 17 *Information Needed for a Criminal Investigation*, 3:14-xr-90532-NC-1 (N.D. Cal. 2014); *see also*
 18 *United States v. Davis*, --- F.3d ---, 2015 WL 2058977 (11th Cir. 2015); *In re Application of United*
 19 *States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013); *In re Application of the United*
 20 *States for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to Gov’t*, 620
 21 F.3d 304 (3d Cir. 2010); *State v. Smith*, --- A.3d ---, 156 Conn.App. 537 (2015); *Commonwealth v.*
 22 *Augustine*, 4 N.E.3d 846, 467 Mass. 230 (2014); *United States v. Jones*, 908 F. Supp. 2d 203
 23 (D.D.C. 2012).

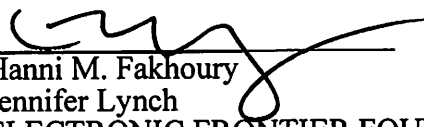
24 EFF’s *amicus* brief will not be repetitive or redundant of the brief to be filed by the Federal
 25 Public Defender. EFF’s brief will focus on the growing judicial and legislative consensus across the
 26 country that people have an expectation of privacy in their telephone and historical cell site records.
 27 EFF’s *amicus* brief highlights how California specifically recognizes an expectation of privacy in
 28

1 phone records under the state's constitution. The California Supreme Court has explicitly rejected
 2 the U.S. Supreme Court's holding in *Smith v. Maryland*, 442 U.S. 735 (1979), and has held that
 3 Californians have a subjective expectation of privacy in information disclosed to phone companies.
 4 *See People v. Blair*, 25 Cal.3d 640 (1979). While not dispositive of the Fourth Amendment issue,
 5 these authorities suggest that, more so than ever before, society as a whole recognizes as reasonable
 6 an expectation of privacy in phone records that reveal a person's location. That means the
 7 government must use a warrant supported by probable cause to obtain historical cell site
 8 information. *See, United States v. Cooper*, 2015 WL 881578, at *8 (N.D. Cal. Mar. 2, 2015)
 9 ("Society's expectation of privacy in historical cell site data is also evidenced by many state statutes
 10 and cases which suggest that this information exists within the ambit of an individual's personal and
 11 private realm... While state law is, of course, not dispositive on this question, 'the recognition of a
 12 privacy right by numerous states may provide insight into broad societal expectations of privacy.'").

13 EFF therefore requests this Court permit it to file an *amicus* brief of no more than 20 pages
 14 on June 12, 2015.

15 DATED: June 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2015, I filed the foregoing with the Clerk of the Court and caused to be served by U.S. Mail, postage thereon fully prepaid, a true and correct copy of the foregoing on:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Dated this 4th day of June, 2015.


Stephanie Shattuck